UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 19,754

GREENBERRY SIMMONS, - - - - - Appellant,

versus

CITY OF EL PASO, - - - - - - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

HAROLD S. LONG,
Caples Building,
El Paso, Texas,

GREENBERRY SIMMONS,
Kentucky Home Life Building,
Louisville 2, Kentucky,
Attorneys for the Appellant.

October 5, 1962.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

RIDER SHEET.

This is an appeal fom an Order of Dismissal which was entered by the District Judge.

This brief was printed for the District Court. No written opinion was filed by the Court. The Plaintiff's Motion for Summary Judgment was Denied (R. 34, 143-145).

The Defendant's Motion for Summary Judgment was sustained, and the suit dismissed with Judgment for the Defendant (R. 143-145).

Plaintiff's Motion and Petition for Rehearing calling attention to the claimed errors was overruled (R. 133-138).

The Appellant will be referred to throughout this brief as the Plaintiff and the Appellee will be referred to as the Defendant.

The *Specification of Errors* will be found on Page 16-a of this brief. *The Brief of Argument* will be found on Page 16b-16i.

I, Greenberry Simmons, certify that I have this 5th day of October, 1962, mailed a copy of this brief to Mr. Morris A. Galatzan, El Paso Natural Gas Building, El Paso, Texas, Attorney of Record for the Appellee, City of El Paso.

(s) GREENBERRY SIMMONS

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UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil No. 2334.

GREENBERRY SIMMONS, - - - - - *Plaintiff,*

v.

CITY OF EL PASO, - - - - - *Defendant.*

BRIEF FOR PLAINTIFF ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

JURISDICTION.

Jurisdiction of this action exists by the virtue of the diversity of citizenship between the defendant and the plaintiff and the controversy exceeds exclusive of interest and cost, the sum of $10,000.00. 28 U.S.C.A. 1332. *Ely* v. *New Mexico and A. R. Co.,* 129 U. S. 291.

The defendant in its answer has admitted Paragraph 1 of the plaintiff's complaint. R. 1

Jurisdiction is further found on title 28 U.S.C.A. 1655 involving the question of title to real estate located within this District. *Louisville and Nashville Railway Company* v. *Western Union Telegraph Company,* 234 U. S. 369, 377-378 (1914). *Porter* v. *Cook,* 63 F. 2d 637, C.A. 5, 1933. R. 5

THE QUESTIONS.

1. There is no genuine issue as to any material fact and is plaintiff entitled to a judgment as a matter of law under F.R.C.P., Rule 56?

2. Did plaintiff substantially comply with the requirements of the Act in the reinstatement of his forfeited lands in 1952?

3. If plaintiff did legally reinstate his land or if he did not do so, was it the duty of the Attorney General of the State of Texas to adjudicate and clear plaintiff's claim, on record in the Land Office, including the contract of 1910, to the title to these lands before they could be offered again for resale by the Land Commissioner?

4. If the Land Commissioner and his attorneys were correct in refusing plaintiff's reinstatement, because the legislative amendments in the Acts of 1941, 1951, and the Act of 1955, then do these legislative Acts taken together impair the obligation of contract, insofar as they attempt to apply to contracts made before their enactment, and are unconstitutional?

STATUTES INVOLVED.

1. *Acts 1897 c. 129 p. 185* Statute in force when contract in 1910 was made covering reinstatement of forfeited lands. The portion of the statute involved is as follows:

> "In any case where lands have been forfeited to the state for non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no right of third persons may have intervened. In all such cases, the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred."

The entire section of the above statute may be found in the Appendix, No. 1, to this brief with the portion of the statute involved marked for emphasis.

2. *Acts 1941, 47th Leg., p. 351, ch. 191, Sec. 3; Acts 1951, 52 Leg., p. 92, ch. 59, Sec. 2.* Art. 5326, formerly Art. 5423, Vernon's Civil Statutes of the State of Texas, Annotated. The above Acts of 1897 found, in No. 1, above was changed and amended in 1941 and 1951, by the State Legislature and among other basic changes, the portion of the statute involved added 5 years limitation, as follows:

> "* * * Such right must be exercised within five (5) years from the date of the forfeiture. * * *"

The entire Section of each of the two Acts, the 1941 Act and the 1951 Act will be found in the Appendix, No. 2, No. 3, to this brief with the pertinent portions pertaining to the reinstatement of forfeited land marked for emphasis.

3. *Acts, Feb., 1900, Sec. 8, ch. 11, p. 29 at pp. 33-34.* See Session Acts 1900 First Called Session, p. 29 at pp. 33-34. (Entire Section in Appendix No. 5.)

The above Act was the Act in force at the time the contract was made in 1910, and it involves the duty of the Attorney General for the State of Texas to clear titles to land where there is someone claiming that title, before it can be resold by the General Land Commissioner. The portion of the statute involved is as follows:

> "When any of the lands described in this Act, or any of the other public lands of the state held are owned by any fund, or any land in which the state, or any such funds have an interest, are held, occupied or claimed by any person or association or a corporation, adverse to the state, or to such fund, it shall be the duty of the Attorney General to institute suit therefor," etc.

The above Act was passed in 1900 and stayed the same until 1939 and this Act is taken from Mr. Chief Justice Gaines' quotation of the statute in the case of *Juencke* v. *Terrell,* 98 Tex., 237, S. Ct. Tex. 1904, 82 S. W. 1025, 1026, and is quoted in entirety, in 1914 by Court of Appeals for 5th Circuit, *Southern Pine Lumber Company* v. *Consolidated Lumber Company,* 217 F. 719, 724-725.

The above Act, after the 1939 revision, was and now reported as Article 5420, Vernon's Civil Statutes of the State of Texas, Annotated.

4. State of Texas, *Senate Bill No. 295, Ch. No. 278, 56th Legislature, regular session 1955, May 20, 1955,* recorded in the Secretary of State's Office May 23, 1955. This Act is not in any of the Vernon's Civil Statutes of the State of Texas. See the Appendix No. 4, of this brief for a certified copy of this Act.

The above Legislative Act granted to the Commissioner of the General Land Office authority to resell, settlers vendees land to the State's own Municipal Corporation, the City of El Paso, the defendant.

5. *Art. 5409, 5374, 4189* Conflicting title; cancellation. 1883, p. 113, G.L. Vol. 9, p. 1419. This statute merely tells how the defendant can apply to the General Land Office, to refund the amount of money which they formerly paid the Land Commissioner in view of the prior conflicting title.

6. *Art. 5411, 5378, 5404* Purchase money refunded. 1883, p. 113, G.L. Vol. 9, p. 419. This statute merely provides in case the defendant loses this action that they will be entitled to get their purchase money refunded upon the returning of their patents to the Land Commissioner.

SECTIONS OF THE CONSTITUTION OF THE UNITED STATES, INVOLVED.

Art. 1, Sec. 10 of the Constitution of the United States. Portion involved is as follows:

> "* * * No state shall * * * pass any * * * law impairing the obligation of contract * * *."

STATEMENT OF CASE.

The controversy in this case is that both plaintiff and defendant are claiming the same lands located in El Paso County, Texas. Both claim title from the General Land Commissioner for the State. Plaintiff's prior title depends upon whether he, as a matter of law, reinstated his forfeited lands in July 1952. If he did, defendant's subsequent patents are of no avail.

I. The Contracts and Awards of Settler's Vendee Made in 1910 Are Sources of Plaintiff's Titles.

January 30, 1910 settlers, W. H. Glenn and John B. Kilpatrick, made application to the Land Commissioner of the State of Texas "For Land Addition to Home Tract". On April 30, 1910 the awards were made to them by the Land Commissioner. R. 43-44, 67-68

The defendant in his Response to plaintiff's Request for Admission, admitted the genuineness of these certified official records in the General Land Office. R. 20

II. The Contract Includes Chapter 129, Act 1897.

Both contracts[1] made with the state provided in the first two lines:

> "I hereby apply to purchase under the provisions of Chapter 47, Act of 1895, and *Chapter 129, Act of May 19, 1897*, and the Acts approved April 19, 1901, April 15, 1905, and May 16, 1907, the following land * * *." (Emphasis added.)

When the state made the awards[2] on April 30, 1910, the *Act of 1897, Chapter 129* became part of these contracts. The award is attached to the application-contract, all three are in one official instrument.

Three years later both settlers, Glenn and Kilpatrick were issued three years Occupational Certificates[3] by Land Commissioner, showing that they had lived on the land and improved the land for over the three-year period.

Throughout the following years the interest was paid on the contracts and the land by deeds were taken over by heirs and the subsequent vendees. Records of same are in the Land Office and County Clerk's Office, El Paso County, Texas. Plaintiffs' Exhibits Nos. 1 to 33A. R. 43 125

On July 21, 1947 the lands were forfeited to the State of Texas for non-payment of interest. R. 63 101

For the purposes of this brief the General Land Office Commissioner and the General Land Office may

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[1, 2]Plaintiffs' Exhibits Nos. 1, 16. (Application, Contract and Award all in one instrument and Award signed by Land Commissioner.) R. 43 44

[3]Plaintiffs' Exhibits Nos. 2, 17. R. 46, 48 69 67-68

be referred to as the Land Commissioner and the Land Office.

The Land Commissioner had never required deeds to be filed in his office,[1] when the heirs or the vendees had forfeited land reinstated in his office, however, he did have a form No. G142-444-5M which he sent to those claiming to be the owners who wished to reinstate the forfeited land. This form among other things provided:

> 1. Sworn statement by the owner or his legal representatives state that (blank, name to be filled in) was "the owner of the following described land."
>
> 2. "That the above land has been forfeited for the non-payment of interest and affiant hereby tenders all delinquent interest and requests that this tract be reinstated."

The Land Commissioner's requirements were only as to who claimed to own the land and pay all the back interest to have it reinstated. He required no other proof of ownership; provided no rights of third parties had intervened insofar as his office was concerned.

On July 23, 1952 the Commissioner received the above forms filled in, claiming ownership of the involved land and tendering all interest due, from this plaintiff.[2] The Land Commissioner replied by his letter of July 24, 1952 acknowledging the receipt of these claims to these lands and checks for the interest;

---

[1]Plaintiffs' Exhibits Nos. 33, 33A. Letter of Acting Commissioner Wallace, September 6, 1952, to the plaintiff. Defendant has admitted the genuineness of this letter. R 123, 125

[2]Plaintiffs' Exhibits Nos. 32B, 32C, 32D, 32E. R 120, 121

also acknowledged the telephone conversation between his office and the plaintiff about reinstatement, on July 21, 1952.

III. The Land Commissioner's Letter Acknowledges Request For Reinstatement of the Forfeited Lands and Payments For Same But Refused It, Based on the Wrong Act of 1951.

The Land Commissioner said:

> "* * * the forfeiting owner his heirs or assigns, must exercise such right within five (5) years from the date of the forfeiture."

A certified copy of the letter[1] which is on file in the Land Commissioner's Office, and is now and has been ever since July 24, 1952 the date written and is part of the official record of the Land Commissioner's Office, which is as follows:

"July 24, 1952

Mr. Greenberry Simmons
Western Lodge
Box 647
Van Horn, Texas

Dear Mr. Simmons:

This is in reply to your telephone conversation with Mr. Leggott on July 21, 1952 in regard to the reinstatement of Section 235, L. E. Mundy Survey, and the N 2 of Section 240, N. D. Mundy Survey, both in El Paso County, Texas.

[1]Plaintiffs' Exhibits No. 32, (No. 32A). Certifications on all Plaintiffs' certified copies, fulfill authentication under Rules 44, (43), F.R.C.P. (also see, Texas Statute, Arts. 5262, 5265).

With reference to the reinstatement of forfeited accounts as set out under the provisions of Article 5326, Revised Civil Statutes, in order to reinstate a forfeited account, the forfeiting owner, his heirs or assigns, must exercise such right within five years from the date of forfeiture. To exercise such rights the application to reinstate and also payment of all interest and penalty must be received in the five year period.

In considering this matter, our attorneys have decided to reject the applications to reinstate the above described lands and the applications were not received until July 23. Due to this fact, your applications are being returned together with your two payments received on July 23.

I am also returning your application to reinstate Section 24, Block 70, Township 1, in Hudspeth County together with your check in the amount of $1,158.11 and a signed check for blank amount.

Sincerely yours,

BASCOM GILES, *Commissioner of the General Land Office*"

CRL:jw
Encs."

Certified Copies of above letter have been received from Mr. Jerry Sadler, the present General Land Commissioner for the State of Texas, one dated October 18, 1961, the other dated July 26, 1961. The certifications are as follows:

GENERAL LAND OFFICE, AUSTIN TEXAS

October 18, 1961

I, JERRY SADLER, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse side hereof is *a true and correct copy of the original of this instrument now on file in this office*[1] together with all endorsements thereon and further certify that I am the officer who has the custody of the filed original official records from which these true Certified Copies were made.

IN TESTIMONY WHEREOF, I, hereunto set my hand and affix the seal of said office the day and date first above written.

(s) JERRY SADLER,
Commissioner of the General Land Office.

(Seal)

GENERAL LAND OFFICE, AUSTIN, TEXAS Jul 26 1961

I, JERRY SADLER, Commissioner of the General Land Office of the State of Texas, do hereby certify that on the reverse hereof is *a true and correct copy of the original of this instrument now on file in this office*[1] together with all endorsements thereon.

IN TESTIMONY WHEREOF, I, hereunto set my hand and affix the seal of said office the day and date first above written.

(s) JERRY SADLER,
Commissioner of the General Land Office.

(Seal)

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1. Emphasis added.

These Certifications taken together with Judge Ben H. Rice, Jr.'s Certificate, all filed in this case, are sufficient to authenticate this letter as an official record of the General Land Office under Rule 44 (43) F.R.C.P. S. 35 11

The defendant has admitted the genuineness of this letter and also the original of it, in its Response to the Plaintiff's Request For Admission. R. 20 - 21

IV. Act of 1897 Applies and Not the Subsequent Amended Act of 1951.

The Legislative *Act of 1897, ch. 129* providing for the reinstatement of forfeited land, at the time these contracts were made in 1910, had no five (5) year time limitation or any other time limitation, to have forfeited land reinstated, according to Mr. Justice Greenwood of the Supreme Court of Texas which in 1930 said as follows:

> "*Since 1897, our Statutes have provided:*
>
> "In any case where lands have been forfeited to the state for non-payment of interest the purchaser, or their vendees, may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on said claim up to the date of reinstatement, provided that no rights of third persons may have intervened. Acts 1897, c. 129, p. 185; 10 Gammel's Laws of Texas, p. 1239; Art. 5326, 15 Vernon's Annotated Revised Civil Statutes 1925." *Cruzan v. Walker*, 119 T. 189, 26 S. W. 2d 908, S. Ct. Tex., 1930. (Emphasis added.)

The above portion of the statute was made part of the contract and has the same citations. *Acts 1897, c. 129* which we have stated above is found in the first two lines of the contract. It is also found in a second place, called "Obligation" part of the contract. R. 47-54, 138-141

The above *Act 1897, ch. 129* was amended by the Texas Legislature in 1941 and 1951 Acts. Among other basic changes both the 1941 and 1951 Amended Acts provided as follows:

> "Such right must be exercised within five (5) years from the date of the forfeiture."

The land involved was forfeited to the State on July 21, 1947 for non-payment of interest; the forfeiting owner being D. H. Heinemann, Estate.

This plaintiff recorded his deeds in the County Clerk's Office of El Paso County, Texas, from the son and the widow, the sole heirs of the D. H. Heinemann, Estate July 14, 1952. Defendant has admitted the genuineness of these deeds. R. 20, 21, 104, 116

The Land Office has never been interested in the deeds. All it has requested was the notice of the claim as owner and the payment of all the back interest. R. 120, 121

On July 23, 1952 the Land Commissioner received the written claim of ownership together with all the back interest, with a request to reinstate forfeited land for this plaintiff. R. 120, 121

The Land Commissioner in his letter of July 24, 1952 refused to reinstate the land. Reason for his refusal was not in the statute in 1910 at the time of

making the contract. The Land Commissioner was applying the five (5) year limitation put in the amended Acts of 1941 and 1951, which was put in after the contract was made. R. 116, 118

After the Land Commissioner's second letter of September 6, 1952, with reference to the D. H. Heinemann, Estate lands,[1] the plaintiff received no further notice from the Land Office. The defendant's answer stated that the Land Commissioner granted patents to the defendant January 26, 1956.

This plaintiff for the first time on June 1, 1961 found out that the defendant had received these patents under a special Legislative Act passed in 1955, which is not published in any of the Vernon's, Revised Civil Statutes of the State of Texas. It is filed in the Secretary of the State's Office, *Senate Bill No. 295, ch. No. 278, 56th Legislature, Regular Session, 1955,* signed by the Governor on May 20, 1955 and filed for record in the Secretary of State's Office on May 23, 1955.[2]

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[1]Plaintiffs' Exhibits Nos. 33, 33A. The defendant has admitted the genuineness of this letter. R. 123, 125

[2]See Appendix No. 4 to this brief for a Certified Copy of this Act.

V. Settler-Vendees' Rights to Reinstate Their Forfeited Lands Is a Vested Right According to the Supreme Court of Texas.

The Supreme Court of Texas for over half a century has many times down to the present time held that the settler-vendees' right to reinstate their forfeited lands, is a vested right, which no subsequent statute or Act of the Land Commissioner can take away from him. Authorities will be shown later in this brief (Brief p. 16f, 30, 33).

This case is thus a controversy between the settler's vendee with their contracts and awards for lands made in 1910 from the General Land Commissioner of Texas, which specifically state in said contract that the following Acts are part of the contract itself; *ch. 129, Acts May 19, 1897*, and others. Whereas the defendant is claiming its right under awards of 1955 and patents of 1956 for the resale of the same lands.

SUMMARY OF POINTS IN ARGUMENT

FIRST POINT. There Is No Genuine Issue as to Any Material Fact and the Plaintiff Is Entitled to a Judgment as a Matter of Law Under His Motion for Summary Judgment. F.R.C.P. Rule 56.[1]

SECOND POINT. Plaintiff Substantially Complied With the Requirements of the State Statute Specified in the Contract of 1910 For the Reinstatement of the Forfeited Land.

THIRD POINT. If Plaintiff Did Legally Reinstate His Lands Or If He Did Not Do So, It Was the Duty of the Attorney General of the State of Texas to Adjudicate and Clear the Plaintiff's Claims on Record in the Land Office, Including the Contract of 1910, to the Title to These Lands Before They Could Be Offered Again For Resale by the Commissioner.

FOURTH POINT. If the Land Commissioner and His Attorneys Were Correct in Refusing Plaintiff's Reinstatement, Because the Legislative Changes in the Acts of 1941, 1951, 1955 Then These Legislative Acts All Taken Together Impair the Obligation of Contract, Insofar as They Attempt to Apply to Contracts Made Before Their Enactment, and Are Unconstitutional.

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[1]For authorities relied upon for each point herein, see index pp. i-v.

THE SPECIFICATION OF ERRORS.

I. The District Court erred in denying Plaintiff's Motion for Summary Judgment.

I-A. The Court erred in sustaining the Defendant's Motion for Summary Judgment and in dismissing the suit.

II. The Court erred in failing to recognize that Plaintiff, as a matter of law, reinstated his forfeited lands in July, 1952.

III. The Court erred in failing to recognize that the Land Commissioner (for the State of Texas) did not have the authority to place these lands on the market for resale and to issue the patents to the Defendant, until after the Attorney General of the State had adjudicated the ownership claims of this Plaintiff to these previously sold lands, actively covering a 42 year period.

IV. The Court erred in failing to recognize, that if the Land Commissioner and his attorneys were correct in refusing Plaintiff's reinstatement because of Legislative changes in the Acts of 1941, 1951 and 1957, then these Legislative Acts taken together, impair the obligation of contract, insofar as they attempt to apply to the vested rights given under the reinstatement of forfeited land statute, as construed by the Texas Courts for over a half century.

BRIEF OF THE ARGUMENT.

First Point.

There is no genuine issue of any material fact, as the Defendant has admitted all facts claimed by the Plaintiff.

This leaves only questions of law to be decided. Did the District Judge err in his legal conclusions in dismissing this suit?

This is an action where both parties are claiming title to two parcels of land totaling 620.65 acres, located in El Paso County, Texas.

Plaintiff's Complaint fulfills the Texas Statutory requirement of Trespass to Try Title.

Plaintiff claims his prior right by reason of the deeds which he obtained from the D. G. Heinemann Estate and recorded on July 14, 1952 (R. 104, 110). By reason of these deeds the Plaintiff obtained whatever right the Heinemann Estate and their predecessors in title, had in these contracts, which settlers Glenn and Kilpatrick obtained when they purchased the land from the State under the purchasing land contracts as part of their home sites on January 29, 1910 (R. 43-44, 120-121).

The big question in this suit is not whether the lands were forfeited, but whether the already forfeited lands were reinstated, as a matter of law. If so, then the original statute still provides:

> "In all cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred." (R. 55-56, 59)

The already substantially performed land purchase contracts, which had been in the process of being performed by many predecessors in title, between the dates of 1910 and 1952, covered 42 years. The substantial performance was as follows: 1/40 of the principal was paid in 1910 by the settlers Glenn and Kilpatrick. Since then for over 33 1/3 years their heirs and successors have paid more interest, at 3 per cent per annum, to the State, than the total contracted purchase price of $1.50 per acre (R. 43, 67). For years, penal interest of 5 per cent on all unpaid delinquent interest was assessed (R. 61, 99). During 1910 and 1913 the settlers spent $2,850.00 in improvements on their home site lands, which included these lands (R. 46). They likewise had to live three years on the land, as their home, in order to obtain it. This was later repealed. These Certificates of Three Year Residence were filed in the Land Office and also recorded in the County Clerk's Office of El Paso County, Texas, in 1913 (R. 46, 48, 69).

In 1947 this land was forfeited for the nonpayment of interest. In July, 1952, this Plaintiff, based upon his recorded deeds, filed his applications, claiming the ownership under these land purchase contracts of 1910 and asked for reinstatement of the forfeited lands. The checks for all back interest to date were also tendered to the Land Commissioner (R. 120-123).

Plaintiff's interest payments tendered, amounted to over one-half of the value of the total purchase price of $1.50 per acre and this was in addition to the interest payments, already made by his predecessors in

title, of over the total contracted purchase price of $1.50 per acre (R. 120, 121).

The three important instruments for the Court to consider are listed above as the contract between the State and the settlers in 1910, and second, the application of the Plaintiff to reinstate the land, and third, the checks which were tendered for the payment of all back interest. Each parcel of land has a contract, application and check. As the two contracts, applications and checks are the same, it will only be necessary to look at one of each (R. 43-44, 67-68, 120, 121).

In July, 1952, no third party rights had intervened to interfere with the Plaintiff's title. The above procedure was the ordinary way these ownerships have been handled throughout the years (R. 36, 38, 43-125).

These recorded deeds had always given the vendees the right to possession of the land involved and they were considered the owners. It was this contractual right to the possession and ownership of the land which was obtained by Plaintiff, and when he recorded his deeds on July 14, 1952, this also became constructive notice to the subsequent purchaser, the Defendant, of such possession and ownership. The Plaintiff with the right to possession and ownership filed his sworn statement of such ownership and application for reinstatement of the land and tendered all back interest (R. 120, 121).

This Plaintiff did everything any reasonable man could do, and was legally required to do, to reinstate his forfeited land purchase contracts made in 1910. There was no further legal duty on this Plaintiff to do

anything further. Now he has brought this suit to get the subsequent purchaser with notice off his land.

Second Point.

Plaintiff and his predecessor in title, subsequently complied with all the requirements of the State Statutes, specified in the land purchase installment contracts of 1910, for the reinstatement of these forfeited lands (R. 120-122). It is well settled in Texas that the reinstatement of forfeited land statute was not passed for the benefit of the State, but for the benefit of the settlers who purchased the land installment contracts and their successors. *Gulf Production Co.* v. *State*, 98 Tex. 237, 231 S. W. 124; 127-128, 131-134; *Cruzan* v. *Walker*, 119 Tex. 189, 26 S. W. 2d 908-909, S. Ct. Tex., 1930; *Anderson, et al.* v. *Neighbors*, 94 Tex. 236, 59 S. W. 543, 544, 546, S. Ct. Tex., 1900; *Freeis* v. *Walker*, 120 Tex. 291, 26 S. W. 2d 627, 629, 630 (1930).

It is well settled in Texas that it is not necessary to have the Land Commissioner for State of Texas, approve the request for reinstatement of forfeited lands. All that is required is to make the request and tender all the back interest, provided that no rights of third persons may have intervened. *Davis* v. *Yates*, 63 C. A. 6, 133 S. W. 281, 284-286, Writ of Error Denied (1911). All these requirements were admitted to have been complied with. Over 30 years after substantial performance of these contracts, the State Legislature in 1941 and 1951 added amendments in the same paragraph, to the reinstatement of for-

feited lands Statute (B. 59), provided for a five year limitation statute, and leaving unchanged the requirement, "Provided that no rights of third persons may have intervened."

It is well settled in Texas for over half a century that the right, to the reinstatement of forfeited lands under the Statute has been a vested right, which could not be taken away by Legislative enactment of the State, where no third party had intervened at that time. *Gulf Production Co.* v. *State,* 98 Tex. 237, 231 S. W. 124, 127-128, 131-134; *Cruzan* v. *Walker,* 119 Tex. 189, 26 S. W. 2d 908-909, S. Ct. Tex., 1930; *Anderson, et al.* v. *Neighbors,* 94 Tex. 236, 59 S. W. 543, 544, 546, S. Ct. Tex., 1900; *Davis V. Yates,* 63 C. A. 6, 133 S. W. 281, 284-286, Writ of Error Denied (1911).

In July, 1952 at the time Plaintiff requested reinstatement, the Land Commissioner had no standing to deny reinstatement because, there were no third party intervening rights present; neither did this Defendant have any standing to have Plaintiff's request denied because it had no intervening rights at that date, and later it became a subsequent purchaser with constructive notice.

Third Point.

The Land Commissioner did not have authority to place these lands on the market for resale and issue the patents to the Defendant until after the Attorney General of the State had adjudicated the claims of the Plaintiff to these lands. *Southern Pine Lumber Co.* v. *Consolidated Louisiana Co.,* 217 F. 719, 723-

725, C .A. 5, 1914; *Juencke* v. *Terrell,* 98 Tex. 237, 82 S. W. 1025, 1026, S. Ct. 1904.

The Texas State Constitution, Art. 14, Section 2, provides that the State shall issue patents only upon vacant and unappropriated public domain, "and not upon land titled or equitably owned under the color of title from the sovereignty of the State, evidence of the appropriation of which is on the County Records or in the General Land Office." The Plaintiff's claims of ownership were both "on the County Records" (R. 104, 110) and "in the General Land Office" (R. 120, 121, 116-119. Also see, for record covering over the 45 year period in both offices R. 43-125).

The Affidavits claiming ownership were included in the applications for reinstatement of the forfeited lands (R. 120, 121) and acknowledged in the letter from the Land Commissioner, dated July 24, 1952 (R. 116-119).

Fourth Point.

If the Land Commissioner and his attorneys were correct in refusing Plaintiff's reinstatement because of Legislative changes in the Acts of 1941, 1951, and 1955, then these Legislative Acts taken together impair the obligation of contract insofar as they attempt to apply to these contracts made before their enactment and are therefore unconstitutional. *Drumwright, et al.,* v. *Texas Sugarland Co., et al.,* 16 F. 2d 657, 658, C. A. 5, 1927, Cert. denied, 274 U. S. 749; *Frank* v. *The State Bank and Trust Co.,* Tex. Com. App. 1924 (Entered as judgment of Supreme Court, Tex.), 263 S. W. 255, 256, 258.

It is well settled in Texas that the State cannot itself refuse reinstatement of forfeited lands unless there are third party rights, and this right is a vested right of the purchaser and its vendees and their successors in title. *Gulf Production Co.* v. *State,* 98 Tex. 237, 231 S. W. 131-132, 134; *Hooks* v. *Kirby,* 58 C. A. 335, 124 S. W. 156, Civ. App. Tex., Writ of Error Denied. This principle was well stated as follows: "* * * this right became vested and cannot be impaired by subsequent legislation." *Cruzan* v. *Walker,* 119 Tex. 189, 26 S. W. 2d 908, 909, S. Ct. Tex., 1930; *Anderson, et al.* v. *Neighbors,* 94 Tex. 236, 59 S. W. 543, 544, 545, S. Ct. Tex. 1900.

Purchasers contracts and awards for public lands by the State, as part of their home sites, which were in the process of execution and interest paid on them for over 30 years and substantially performed, were too far executed to permit subsequent legislation, giving the State these valuable lands by adding additional limitations not in the statutes and conflicting with vested rights, which were part of these contracts and awards at the time they were made in 1910. *Pennoyer* v. *McConnaughty,* 140 U. S. 1, 9, 10, 24-25.

The history of the Legislative Act of 1897, (B. 55, 56) being the Act under which the 1910 contracts were made, is clearly shown in *Freels* v. *Walker,* 120 Tex. 291, 26 S. W. 2d 627, 629, 630 (1930), Com. of App., Rehearing denied. The State cannot modify vested rights, except by mutual consent of any provision of a pre-existing contract into which it may have entered. *New Jersey* v. *Wilson;* 7 Cranch 164, 167; *Sovereign*

Camp v. *Wilentz*, 23 F. Supp. 23, appeal dis., 306 U. S. 573, D.C.N.J., 1938; *Columbia Railroad Company* v. *South Carolina*, 261 U. S. 236, 248, 251 (1922). The State does not have power to pass amendments, under the pretense of changing the remedy, which undertakes to compel the party to accept something different in place of the vested rights for which he contracted. *McCracken* v. *Hayward*, 2 How. 608.

On July 23, 1952, after these vested rights of the predecessors in title had been exercised by this Plaintiff, these previously forfeited lands became reinstated, as a matter of law, no matter what the Land Commissioner and the State of Texas or anyone else did after that. No matter if the five-year limitation statute had been added by amendment or any other provision, it could not prevail over what the Texas Courts have, for over half a century, held to be present existing vested rights.

The equitable rights of this Plaintiff here, under these 1910 contracts, are the same as if his predecessors in title, settlers Glenn and Kilpatrick were standing before this Court crying for relief in saving their homes built on these lands over 42 years ago. Many other heirs and vendees of settlers have these unmatured land purchasing contracts still existing.

We respectfully submit, that the District Court Judgment for the Defendant and the sustaining of the Defendant's Motion for Summary Judgment, should be reversed and the Plaintiff's Motion for Summary Judgment should be sustained, and the Judgment should be for the Plaintiff.

ARGUMENT.

FIRST POINT.

There Is No Genuine Issue as to Any Material Fact and the Plaintiff Is Entitled to a Judgment as a Matter of Law Under His Motion For Summary Judgment. F.R.C.P. Rule 56.

The request for Admissions[1] which composed of the plaintiff's Exhibits No. 1-33A show that all this is documentary and official records. These certified copies of official records come from the General Land Office for the State of Texas or the County Clerk's Office, El Paso County, Texas. All are certified copies of official records or adequately referred to in certified copies. R. 43-125

Defendant in its Response to plaintiff's Request for Admission, "Admits the genuineness of all documents and instruments marked Exhibits 1 through 33A," except, Exhibits 32B to 32H, both inclusive. R. 20

The seven above Exhibits, not admitted and excepted by the defendant, are the 3 applications of the plaintiff to reinstate forfeited lands and the 4 checks "for interest to reinstate" such lands.

The lands above are the lands plaintiff obtained in his recorded deeds of July 14, 1952 from the D. H. Heinemann, Estate. Plaintiff's Exhibit Nos. 28, 30. R. 104

All seven are acknowledged in the Certified Copy of the letter of July 24, 1952 from the General Land Commissioner, when he returned them from his General Land Office on that date. R. 116, 118

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[1] 28 U.S.C.A. Rule 36. F.R.C.P.

The defendant has admitted the genuineness of this letter which acknowledged the receipt of each of the 7 instruments and returned them enclosed with the letter. R. 2[illegible]

Each of the 7 instruments has a number stamped upon it which was stamped upon it by the General Land Commissioner's Office at the time it was received there, which was done because of a law requiring same to be done. R. 120, 121, 122

In addition to this number on each, the 3 applications also has an additional stamp put on them upon arrival at the General Land Office. The 2 applications involved are as follows:

"RECEIVED
JUL 23, 1952
GENERAL LAND OFFICE."

The small numbers stamped upon each application has the same number stamped in the upper right-hand corner of the corresponding bank checks. The stamped number 43325 on the application to reinstate forfeited lands of N 2 of Survey 240 was also stamped on the corresponding check for interest of $430.11 due to reinstate that piece of land.

The plaintiff's Exhibit No. 32D, Application to Reinstate Survey 235 has the General Land Office stamp No. 43326 and the corresponding bank check for $251.02 interst to reinstate Survey 235 has the corresponding No. 43326 stamped on it in the upper right-hand corner.

These 7 originals are in the United States District Court Clerk's safe. Also the original letter of July 24, 1952, the Land Commissioner sent in returning them.

The Certified Copy of the letter of July 24, 1952 from the General Land Commissioner, of which defendant admits the genuineness, shows that all these 7 were delivered into the custody of the General Land Commissioner and the General Land Office. Whether he kept them or not they were deemed, as a matter of law, to have been filed in the General Land Office. The Supreme Court of Texas has so ruled in a similar case. *Snider* v. *Methvin,* 60 Tex. 487, 494, S. Ct. Tex. (No S. W. citation, as it was before the S. W. Reporter started.); *Holman* v. *Chevallier,* 14 Tex. 337, 339, S. Ct. Tex. (No S. W. Reporter cited.)

The above Snider case is cited for this authority in Note 1, under *Article 5261,* Vernon's Civil Statutes of the State of Texas, Annotated, Revision of 1925.

Articles 5261, 5262, 5263, 5265, required the General Land Office Commissioner to keep and file all papers pertaining to land title concerning the state.

The title of the lands depends upon whether these forfeited lands were reinstated, as a matter of law, in 1952 with the General Land Office. Plaintiff applied for such reinstatement and sent all interest due to the Land Commissioner. The Land Commissioner replied by letter that he received them too late to permit reinstatement under the law.

Plaintiff contends that the Land Commissioner, without authority of law, used a portion of the statute

not in the law at the time the contract was made, but which was added by Legislative Amendment later.

The law enforced and set out in the contract itself, at the time the contract was made with the state, had no time limit in it.

The Legislative amendment later provided additional basic changes, including the right to reinstate, which must be exercised within five (5) years from date of forfeiture.

In the *Gulf Production Company* v. *State,* 98 Tex. 237, 231 S. W. 127, Civ. App. 1921, error refused, *supra,* it is said at p. 126 S. W. as follows:

> "And there was no conflict in the parole evidence, which was explanatory of, and forfeited the effect of, the documentary evidence, thus in effect eliminating all issues of fact, so that the only questions arising in the case are questions of law to be applied to undisputed facts."

This leaves only questions of law to be decided by the Court.

SECOND POINT.

Plaintiff Substantially Complied With the Requirements of the State Statute Specified in the Contracts of 1910 For the Reinstatement of the Forfeited Lands.

The statute for reinstatement of forfeited lands for non-payment of interest has been the same in Texas from 1910 to 1941. It had no five (5) year limitation placed on the forfeited land owner, nor did it have any time limitation period in it. *Cruzan* v. *Walker, supra.*

During the 31 year period this portion of the statute has been clearly defined by the Supreme Court of Texas and the Court of Civil Appeals of Texas.

The original contracts were made with settlers W. H. Glenn and John B. Kilpatrick, on January 29, 1910, plaintiff's Exhibits Nos. 1, 16, in the first two lines of these contracts it provides in part as follows:

> "I hereby apply to purchase under the provisions of * * * Ch. 129, Act of May 19, 1897 * * * The following land situated in El Paso County * * *." R. 67-68, 133-141

When the state awarded these lands on April 30, 1910 to the settlers it made the above Act part of the contract. R. 141, 68

This is the Act plaintiff had to comply with when he became vendee of the D. H. Heinemann, Estate which was the last forfeited owner on the Land Office record. R. 63, 101

What did the statute require? It required:

1. That no third party's rights had intervened before the application to reinstate was received.

2. That all back interest be paid to the date of reinstatement. B 55

These two requirements were fulfilled. To this date these two have not been questioned.

It had nothing in it requiring any time limit whatsoever.

The plaintiff's Exhibit Nos. 32, 32A, 32B, 32C, 32D, 32E, show that the above was substantially complied

with. These Exhibits are the applications made by plaintiff and checks sent for interest and the letter from the Commissioner, dated July 24, 1952, denying reinstatement of the forfeited lands. B. 116-121

The Supreme Court of Texas has repeatedly stated that the above substantially complies with this Act. Such authorities will be stated subsequently.

What right did the forfeited owner have between the time of forfeiture, July 21, 1947 and to the date of reinstatement, July 23, 1952? When plaintiff complied with the two above requirements this forfeited land, as a mater of law, became reinstated. B. 54

Nothing could the Land Commissioner do or not do, could or can, keep this land from being reinstated on July 23, 1952. B. 54

During the period between July 21, 1947 and July 23, 1952 while it was forfeited, the forfeited owner had a vested right to reinstate under *ch. 129, Act of May 19, 1897.* B 28

The Supreme Court of Texas has repeatedly held that during this period this was a vested right which could not be defeated except by some third party right intervening, before the reinstatement was complied with. This did not happen. Likewise the state could not be the third party referred to in the statute. The state was the first party and the vendee was the second party, so the state could not be the third party.

Furthermore the Court has held that this forfeiture and reinstatement statute should be liberally construed in favor of the parties for whom it was passed to help, namely the purchasers, heirs and vendees of the land

contracts and was not passed for the benefit of the State.

The statute referred to in the contract of 1910 as *Ch. 129, Act of May 19, 1897* covers the reinstatement of forfeited lands at page 185. It is the same Act which was in force on the same subject up until the amendment of 1941.

The Supreme Court of Texas, in the case of *Cruzan v. Walker,* 119 Tex. 189, S. Ct. 1930, 26 S. W. 2d 908, 909, said that the same statute on reinstatement of forfeited lands, had been in existence since 1897, as follows:

> "*Since 1897, our statutes have provided:* 'In any case where lands have been forfeited to the state for the non-payment of interest, the purchasers, or their vendees, may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement, provided that no right of third persons may have intervened.' Acts 1897 c. 129, p. 185; 10 Gammel's Laws of Texas, p. 1239; Article 5326, 15 Vernon's Annotated Revised Civil Statutes 1925." (Emphasis added.)

It will be noted that this opinion was in 1930 and this Act was still the same Act which was in the contract of 1910 and it has the same citation namely *Acts 1897 ch. 129, p. 185.* However, it will be noted that the additional citation was added because different publishing companies came on during that period of time and published under different Section numbers, but the statute remained the same as set out by the

Judge and has been the same since 1897 to 1930, and remained the same for several years after this opinion up to 1941 when the amendment was made.

The Court went on to say on p. 909:

> "Before the statute was four (4) years old, the Supreme Court announced that the history and purpose of its enactment required that it be interpreted with the utmost liberality in favor of the former owner seeking reinstatement of his purchase. In so construing the statute, the Court declared that in order for an intervening right to defeat reinstatement it must be a vested right enforceable in the Court proceedings. *Anderson* v. *Neighbors*, 94 Texas 240-242, 59 S. W. 543." * * *
>
> "We think rather, that the Legislature had in mind such right of third parties as constitute a present existing bar to reinstatement—an existing, vested right enforceable at the time by the party owning such right. This provision was not inserted for the benefit of the State of Texas, but for the benefit of third parties in whose favor such intervening rights existed; and, when there are no third parties who can lawfully complain of the reinstatement, *the state cannot be heard to do so.*" (Emphasis added.)

Before we leave the quotation of this case we wish to quote it further pertaining to another case which we expect to quote following this case, which is one of the leading cases on this subject in the Texas Courts. However, it is a Civil Appeals case but the Supreme Court in this case said pertaining to the leading case as follows:

"The very question raised by realtor was presented to the Supreme Court, under briefs of imminent counsel, on application for writ of error in the case of *Gulf Production Company* v. *State* (Tex. Civ. App.), 231 S. W. 124, 132. In refusing the application on March 1, 1922 (25 Texas and S. W. Digest, p. 28446) the Court necessarily approved the following portion of the opinion of the Court of Appeals. * * *"

In *Gulf Production Company, et al.* v. *State,* 98 Tex. 237, 239, Civ. App. 1921, error refused, 231 S. W. 124, 131-132, 135, the facts in this case are as follows: The State of Texas brought this suit to cancel the sale of public land. A man by the name of Kidd had the County Clerk make up his application to purchase and the Clerk sent the application and money in to the General Land Office for Kidd. The Clerk put the bid in the land at $1.50 per acre thinking that it was agricultural land only. Later it was classified as mineral and agricultural land. On this there is much proof, however after taking quite a lot of proof the Court narrowed it down to documentary evidence very similar to the kind which is in the case at bar.

Kidd forfeited the land for non-payment of interest, then gave a quit claim deed for his interest in the purchase contract without settlement. There were intervening parties trying to obtain the land on application and did obtain it on application. Then the latter party abandoned the land granted to him on his application because he did not stay on the land the required three year period; after all of this happened the grantee from Kidd had the land reinstated.

Question: Did the grantee of Kidd have the right to reinstate the land? It had become valuable for oil production, estimated value at $8,000,000., 160 acres was involved.

The Lower Court held that the vendee of Kidd could not reinstate under these conditions but when the case came on to the Court of Civil Appeals it reversed the Lower Court and remanded the case, ruling on several points of law including quit claims, reinstatement of forfeited land, forfeiture rights and the lack of the power of the General Land Commissioner to use any discretion in applying the statute to reinstate where no third parties had intervened.

The Court said, "We hold, that the sale to Kidd of the land in controversy was regularly made and is valid * * *." It said at p. 131, S. W.:

> "It was right and just that those who had settled upon and improved the State's lands in response to invitation of the State, and who had endured the hardship incident to such settlement, and the privations instant to such improvement, should be given an opportunity to retrieve their lands when forfeited by reason of temporary misfortune and the consequent inability to meet their payments in strict compliance with their obligation. Forfeitures by statute or contract are not favored. They must be viewed with the cold and literal scrutiny, that the injury wrought may be held to a minimum. On the other hand statutes or contracts designed to relieve from the rigors of forfeitry are looked upon warmly and construed liberally, so as to afford the maximum relief. And this reciprocal rule applies as well to the great

> State of Texas as to the humblest citizen. So, the provisions of the statute for the forfeiture of sales, and for the reinstatement of such sales, should be tested by the rule in question."

Then the Court goes on to quote the same statute as was quoted later in the *Cruzan* v. *Walker, supra,* except it adds the last sentence which is also part of the statute, which is as follows:

> "In all such cases, the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred."

Then the Court goes on:

> "It will be observed that there are two conditions upon which reinstatement may be had: First, the payment of the full amount of interest due by the purchaser up to the date of reinstatement; and, second, the absence of intervening rights of third persons. Appellees seek to inject here a third condition, to wit, that the classification of the land has not been changed since the original purchase was made.
>
> "* * * If the Legislature had intended to provide that the reinstatement must be subject to or defeated by an arbitrary change by the Land Commissioner of the classification and appraisement of the land, it should and would have affirmatively and definitely said so in terms. The provisions for reinstatement were in effect when Kidd purchased the land, and were embraced in the contract between the state and Kidd when the latter purchased, and neither Kidd nor the state could thereafter arbitrarily and without the consent of the other write into the contract any provisions or condition, varying, restricting, or en-

larging the terms thereof. If the state could by act of its Legislature ingraft this onerous condition onto the contract, then by the same license it could by like means increase the original purchase price of the land, or the rate of interest or terms of payment thereon. The payment of the back interest was the only condition so far as the state was concerned, required of Kidd in procuring the reinstatement of his purchase, and the subsequent act of the Commissioner in reclassifying and reappraising the land could not serve to create an additional condition. *Anderson* v. *Neighbors*, 94 Tex. 240, 59 S. W. 543; *Hooks* v. *Kirby*, 58 Tex. Civ. App. 335, 124 S. W. 156 (Writ of error denied); *Wing* v. *Dunn*, 60 Tex. Civ. App. 16, 127 S. W. 1101 (Writ of error denied (Sup) 128 S. W. 108); *Jumbo Company* v. *Bacon*, 79 Tex. 5, 14 S. W. 840; *Bates* v. *Bratton*, 96 Tex. 279, 72 S. W. 157; *Houston Oil Company* v. *McGrew*, 107 Tex. 220, 176 S. W. 45. In *Hooks* v. *Kirby*, *supra*, this principle was well stated as follows:

"* * * this right became vested and cannot be impaired by subsequent Legislation."

The Court in the *Gulf Producing* case, *supra*, goes on to answer the contention that the appellee who tried to inject several other statutes into the issue at this time and the Court said at p. 132 S. W. as follows:

"The most obvious fallacy in this contention is that both the provisions relied on relate exclusively to resale of lands. They do not purport, directly, or indirectly to relate to the reinstatement of forfeited sales. This is obviously from the plain language of these provisions that appellees' contention approaches the frivolous. The provision in Art. 5423 is a part of the forfeiture

clause, relating solely to the resale, and is wholly disconnected from and does not in any respect whatever refer or purport to refer, to the provisions of reinstatement. The forfeiture clause in Art. 5423 provides for three steps (a) forfeiture, (b) revision to the school fund, and (c) resale. The clause for reinstatement, which is separate and apart from the forfeiture clause, prescribes two conditions upon which the reinstatement may be had, (a) payment of all back interest, and (b) absence of intervening rights of third party. There is no condition there that the reinstatement cannot occur in the face of a reclassification or reappraisement of the land. Moreover, the clause affirmatively provides that 'in all such cases' of reinstatement 'the original obligation and penalty shall thereby become as binding as if no forfeiture had ever occurred.'"

The Court goes on to explain why the sundry and various other public land statutes which the appellee tried to inject into this case does not apply to the reinstatement of forfeited lands and continues to quote and say:

"'It will be seen from its language that no stretch of the construction can this provision be made to refer to the reinstatement of forfeited sale.'"

The Court goes on to say on p. 133 of S. W. as follows:

"We think, rather, that the Legislature had in mind such rights of third parties as construed at present existing bar to reinstatement—and existing, vested right, enforceable at the time by the party owning such right. This provision was not

inserted for the benefit of the State of Texas, but for the benefit of third parties in whose favor such intervening rights existed; and, when there are no such third parties who can lawfully complain of the reinstatement, *the state cannot be heard to do so.*" (Emphasis added.)

The Court goes on to say at p. 134 that the right Kidd had could not be taken away from him as it was a vested right.

"And that was a vested right which no statute or act of the Land Commissioner could take away from him. Moreover, the statute (Art. 5423) expressly gives that right to 'the original purchaser or their vendees.' This right may be momentarily obscured by a shadow, such as the Griffin transaction; are entirely obliterated by complete and permanent resale, but it is there, nevertheless, and and is written in clear and express language into the contract between the state and the original purchaser. It is just as clear and definite and tangible as is the right, given in the same contract, to continue the title in force by paying the interest on the 1st of November each year.

* * * * The right to reinstate the Kidd sale was a vested right, and could be defeated only by failure to pay the accrued interest on the land, or by enforceable intervening rights of third parties. No representations of Lewis, whether true or false, could affect that right. He was, or was not entitled to the reinstatement, and nothing he could say would enlarge or lessen the authority of the Land Commissioner."

Besides the *Cruzan* v. *Walker, supra,* quoting extensively from the *Gulf Production Company* v. *State,*

supra, in above case in 1930, also the case of *Freels* v. *Walker* in 1930 to be later quoted and *State* v. *Walden* in 1959, later to be quoted, cited with approval the *Gulf Production* case.

It will be noted that the reinstatement of forfeited land statutes which was passed in 1897, was Art. 4218f later became *Art. 5423* and later in 1925 in the Revised Civil Statutes it became *Art. 5326* but the wording of the Statute was the same since 1897 to 1941.

It is held that when the Land Commissioner tries to set a reinstatement aside, his acts in attempting to do so are void. The Court held same in *Freels* v. *Walker,* 120 Tex. 291, 26 S. W. 2d 627 (1930), the Court said at pp. 629, 630:

> "Another salutary rule of construction is that where a statute is designed to relieve from the rigors of forfeiture, it should be most liberally construed to accomplish that purpose. *Gulf Production Company* v. *State* (Tex. Civ. App.), 231 S. W. 124. * * *
>
> "The reinstatement of the land in question by the Commissioner on August 29, 1924 being prior to the intervening right acquired by the respondent Bowden, was in all things valid, here the Commissioner was without authority to set such reinstatement aside, and his attempt on September 3, 1926, to do so was void."

In 1959 the Texas Civil Appeals Court quoted with approval the 1921 case of *Gulf Production Co.* v. *State, supra,* in *State* v. *Walden,* Civ. App. Tex. 1959, 325 S. W. 2d 705, 711, the Court at p. 711 said as follows:

"It is our duty to construe these laws so as to alleviate against the rigors of forfeiture, for the laws abhors a forfeiture. *Board of Insurance Commissioners of Texas* v. *Great Southern Life Insurance Company,* 150 Tex. 258, 239 S. W. 2d 802, 809; *Freels* v. *Walker,* 120 Tex. 291, 26 S. W. 2d 627; *Oklahoma Tool and Supply Company* v. *Daniels,* Tex. Com. App. 290 S. W. 727. And in *Gulf Production Co.* v. *State,* Tex. Civ. App., 231 S. W. 124, at p. 131 it is said: 'Forfeitures by statute or contract are not favored. They must be viewed with a cold and literal scrutiny, that the injury wrought may be held to a minimum.' The fact that the sale of land was made by quit claim deed, instead of waranty deed has no significance. * * *"

Plaintiff likewise substantially complied with the Act of 1951 in the reinstatement of forfeited land. *Anderson, et al.* v. *Neighbors,* 59 S. W. 543, 544, 545, S. Ct. Tex., 1900. The last day of the exercising of the five (5) years was up on July 21, 1952. The letter of the Commissioner admits a telephone call by the plaintiff on that date about reinstatement of the lands. He further acknowledges that he received within request to reinstate the forfeited lands and payments. Also acknowledges that he was returning the $1,158.11 check which was in addition to the other payment for more than the amount due the Land Office. The stamp on the ~~check~~ application back showed he received July 19, 1952, two days before his claim of the 5 years was up. (See original)

It seems that a liberal construction of the exercised requirement was substantially complied with.

In *Anderson, et al.* v. *Neighbors, supra,* the Supreme Court of Texas said p. 545:

> "The language of the law is broad enough to admit the construction that the Legislature intended that the Commissioner, upon receiving notice of the desire of the purchaser to reinstate the forfeited contract, should allow to such applicant a reasonable time within which to ascertain the amount due and to make payment * * *."

At p. 543:

> "The Legislature, by the proviso 'That no rights of third persons may have intervened' intended to expressly give the protection which the Constitution afforded to vested rights."

This last provision on third persons rights is still in the 1951 Act. The State cannot be the third party and the Land Commissioner in his letter acted without authority in refusing to reinstate the lands. As a matter of law plaintiff's lands were reinstated under the 1951 Amendment as well as under the 1897 Act.

As it was said in *Cruzan* v. *Walker, supra:*

> "* * * When there are no third parties who can lawfully complain of the reinstatement, the state cannot be heard to do so."

The state was not representing a third party here as there was no such third party present, nor could defendant claim to be the third party because it was over three years later that defendant came along. Defendant also had constructive notice of plaintiff's deeds recorded in the County Clerk's Office over 3 years before.

According to the record in this case there was no lawful objection to the reinstatement of plaintiff's forfeited lands in July, 1952 under any of the Acts of 1941, 1951, 1897. Then, as a matter of law, it was deemed to have been reinstated. The Land Commissioner acted without authority of law and could not after plaintiff's reinstatement, resell these lands to the defendant or anyone else, under patents or even under color of title.

THIRD POINT.

The Land Commissioner Did Not Have the Authority to Place These Lands on the Market For Resale and Issue the Patents to the Defendant, Until After the Attorney General of the State Had Adjudicated the Claims of the Plaintiff to These Lands.

Question here is to ascertain whether the Land Commissioner had authority to place the land upon the market and issue patent to the defendant.

The patents obtained by defendant were upon lands not legally upon the market for sale by the Land Commissioner.

The Land Office has many documents and official records pertaining to the involved land, many of which are plaintiff's Exhibits filed in this case. R 43 125

Two were contracts for the sale of these lands issued 45 years before defendant made its application to buy these lands which were already sold. R 43-44 61-68

Down through the years several heirs and vendees have been paying interest on these contracts. R 91-96

As stated before during hard times settlers and vendees of settlers sometime had trouble paying the interest. It happened quite frequently that it became necessary for the forfeited owners to wait for long periods of time before reinstating their forfeited land.

Between 1910 and 1941 the Act providing for reinstatement of forfeited lands had no time limit on the privilege to reinstate. It could be reinstated at any time "provided that no rights of third persons may have intervened."

During one of these periods after the land had been forfeited for several years the land forfeited owner was the D. H. Heinemann, Estate. On one hot July day, July 23, 1952 there arrived at the Land Office sworn applications on forms, formerly sent plaintiff by the Land Office, to be used for these purposes stating that this plaintiff was the owner of these forfeited lands and "affiant hereby tenders all delinquent interest and requests that these tracts be reinstated" and sent the checks to cover same. This oath was made before a deputy County Clerk and has the County Court seal upon it. R 120, 121

The General Land Office placed their stamps on these applications:

"RECEIVED
JUL 23, 1952
GENERAL LAND OFFICE."

and gave each application a number and stamped it on the application and then put the same corresponding number on the check for interest for that particular

application, and placing that little number up in the right hand corner of the check.

The next day the Land Commissioner wrote his letter of July 24, 1952 stating he was returning all applications and checks because they were not exercised within the five (5) year period. He thus applied the 1941 and 1951 amendments instead of the *Act of 1897* which had no five (5) year time limitation or any other time limitation in it. R. 116-119

Possession by the General Land Office Commissioner, himself, of these applications and checks caused them to become official records of the General Land Office; they were deemed by law to have been filed in his office, the same as if he had kept them. *Snider* v. *Methvin*, 60 Tex. 487, 494, S. Ct. Tex. (No S. W. cited); *Holman* v. *Chevallier*, 14 Tex. 337, 339, S. Ct. Tex. (No S. W. cited).

Whether the above records are by law deemed to have been filed or not, the letter the Land Commissioner wrote July 24, 1952 confirmed that this plaintiff was claiming these lands and was tendering payments for back interest. R. 116-119

A copy of this letter has remained filed as a part of his official records in his office. A certified copy of it is plaintiff's Exhibit No. 32. As stated before, defendant has admitted the genuineness of this official record. It makes no difference what file in the Land Office it came from. It refers to 3 files and 3 pieces of land. R. 116-119

In 1900 the State Legislature passed an Act which remained unchanged until 1939 and now is known as

Art. 5420. (5468) Of Vernon's Civil Statutes of the State of Texas, Annotated. Acts 1900, p. 29; Acts 1939, 46th Leg. p. 464, Sec. 1.

The early *Acts of Feb. 23, 1900,*[1] *Sec., 8,* See Session Acts 1900, First Called Session p. 29 at pp. 33-34, which was in force in 1910, at the time of the making of this contract, provided when any of the public lands, or any lands of the state are claimed adversely to the state, it shall be the duty of the Attorney General to institute suit therefor, etc. The 1900 Act, which applies in this case is stronger than the present *Act of 1939, Art. 5420.* The 1900 Act is clearer as to the duty of the Attorney General in case of claims adverse to the state.

According to Mr. Chief Justice Gaines of the Supreme Court of Texas, in the *Juencke* v. *Terrell,* 98 Tex. 237, 82 S. W. 1025, 1026, S. Ct. Tex. 1904, in quoting the 1900 Act in force at the time this contract was made as follows:

> * * * we think that the purpose of the Legislature with reference to them is shown by the eighth section of the Act. That section in part is as follows: 'When any of the lands described in this act, or any of the other public lands of the state held or owned by any fund, or any land in which this state, or any such funds have an interest, are held, occupied or claimed by any person or association or corporation, adversely to the state, or to such fund, it shall be the duty of the Attorney General to institute suit therefor,' etc. From this we think it is to be inferred that the policy of the Legislature in reference to lands

[1]Appendix No. 5.

which were claimed by third parties, was first to establish its title before putting them upon the market for sale, and that it was not intended that they should be sold until the controversy between the state and the claimant had been adjudicated. The present constitution contains this provision: 'All genuine land certificates heretofore or hereafter issued shall be * * * patented only upon vacant and unappropriated public domain, *and not upon any land titled or actually owned under the color of title from the sovereignty of the state, evidence of the appropriation of which is on the County Records or in the General Land Office.*' * * * Const. Art. 14, Sec. 2." (Emphasis added.)

This plaintiff had his claims in both the County Records and in the General Land Office.

In a trespass to try title case the Circuit Court for the Fifth Circuit in 1914 had before it a question of the Statute in force in 1910 as above stated with reference to the duty of the Attorney General under the appropriate statute and above mentioned portion of the Texas Constitution.

The facts were, that in the District Court the plaintiff, Consolidated Louisiana Company exhibited a patent from the Land Commissioner and the defendant claimed what the plaintiff is claiming here, claiming that the Land Commissioner had no authority to place the land upon the market until the Attorney General had adjudicated the prior claim to the land. These instructions were denied by the District Court and the Court of Appeals said in reversing the District Court in the *Southern Pine Lumber Company* v. *Consoli-*

dated Louisiana Company, 217 Fed. 719, 723-725, C. A. 5th, 1914:

> "In 1904 a similar question was passed upon by the Supreme Court of Texas in *Juencke* v. *Terrell, Commissioner*, 98 Tex. 237, 239, 82 S. W. 1025, 1926, in which was construed Section 6 of the Act of 1900. The reasoning of Mr. Chief Justice Gaines applied with peculiar force to the present case, and the opinion is inserted in its entirety:"

We will not undertake to quote the entire opinion as quoted by the Court, however we will quote excerpts from this Court of Appeals for Fifth Circuit, opinion, which are as follows:

> "We are firmly impressed with the conviction that it was the intention of the Legislature, as manifested by the Act to which reference has been made, to reserve from sale lands claimed adversely to the state and to the school fund in good faith under the Spanish or Mexican Grants 'until the controversy between the state and the claimants has been adjudicated' in favor of the state. In the absence of such adjudication the lands could not be legally placed upon the market for sale; and it follows that the act of the Commissioner in selling the land in question to Stevenson was against the law, and hence without validity.
>
> "We are unable to give our assent to the suggestion, made by the Consolidated Company, that the Legislature intended, either by the Act of 1905, or by any subsequent Legislation, to change or in any manner to modify the rule announced in the *Juencke* v. *Terrell*.
>
> "It is further stated by counsel in their brief that the question here involved was determined in favor of the Consolidated Company by the Attor-

ney General and the Land Commissioner, and that the practical construction of those two officials is of great weight, and should be so regarded by the United States Court in construing a statute.

"Having reached the conclusion that the title of the Consolidated Company is without validity, and hence that that company must fail in the suit. * * *"

The Fifth Circuit quoted the entire opinion of the leading Texas case on this subject namely *Juencke* v. *Terrell, supra.* As stated before, this case was decided in 1904. The Fifth Circuit case was decided in 1914. The *Juencke* v. *Terrell, supra,* has been quoted extensively and cited down through the years periodically to the present time in cases in 1920, 1932, in 1943 and in 1960.

In 1920 the case of *Fitzgerald* v. *Robison,* 110 Tex. 469, 220 S. W. 768, 769, the Court said as follows:

"The Commissioner is not a judicial officer. It is not his function to annul grants of land formerly made by the state, and because so made, entitled to be respected until set aside by appropriate judicial proceedings. A patent to land can only be attacked by the state or someone invested with a right prior to the patent.

"If the particular land had been wrongfully patented and it is rightfully a part of the public domain, the remedy of the State is on action in the District Court prosecuted by the Attorney General. Article 5468." (Now Art. 5420.)

The other case in 1932 which cited and quoted extensively the duty of the Attorney General and the

Constitution of the State of Texas as set out in the *Juencke* v. *Terrell, supra,* was *State* v. *Bradford,* 121 Tex. 515, S. Ct., 50 S. W. 2d 1065, 1079, the Supreme Court said:

> "To annul patents and *awards* is not a ministerial duty, and under the law no such duty in this respect rests upon the Land Commissioner. *This requires the exercise of judicial authority.* Nor has the Land Commissioner the power to permit others to acquire rights on the land covered by the patents and *awards* regularly issued by the proper authority, respecting the state, until the differences, if any, existing between the state and the patentees and the *awardees and their assignees,* have been adjusted or adjudicated." (Emphasis added.)

The *Juencke* v. *Terrell, supra,* was again quoted in 1943 in *Davis* v. *Morley,* 169 S. W. 2d 561, 564-565, Civ. App. Tex. The Court said at p. 565 S. W.:

> "It has never been regarded as the ministerial duty of the Commissioner of the General Land Office to annul patents and awards.
>
> "* * * If there is a question about the title to the land, the law requires that the Attorney General bring suit to recover the land or remove the cloud from the title thereof.
>
> "* * * It is the rule to offer for sale only vacant and unoccupied public domain."

Juencke v. *Terrell, supra,* was again cited as authority in 1960, in the case of *Foster* v. *Gulf Oil Corporation,* 335 S. W. 845, 848, Civ. App.

With the official records in the General Land Office showing that these lands were sold to settlers by contract in 1910 and that these settlers and their heirs and vendees having paid interest on these contracts for several decades and that this plaintiff's claims to this land was well known by the Land Commissioner and were on file as official records in his office. R. 43-125 These claims by plaintiff had been made before any intervening third party rights had taken place on July 23, 1952. Based on the above authority cited it would seem that the Attorney General had a duty to adjudicate the plaintiff's claim before the Land Commissioner could resell the land that had been sold ever since 1910.

The Land Commissioner was without authority to sell these lands which had already been sold and awarded in 1910 to settlers and had settler vendee's claims against them on file in his office as of July 23, 1952. He issued awards to the defendant on the same day that the applications arrived in his office November 14, 1955 and then issued patents on them in 1956. These patents, as a matter of law, had no effect.

FOURTH POINT.

If the Land Commissioner and His Attorneys Were Correct in Refusing Plaintiff's Reinstatement Because the Legislative Change in the Acts of 1941, 1951, 1955, Then These Legislative Acts Taken Together, Impair the Obligation of Contract, Insofar as They Attempt to Apply to Contracts Made Before Their Enactment and are Unconstitutional.

As we have seen in the early part of this brief the Supreme Court of Texas has for over a half century held many times and up to the present date, that the right of the settlers vendees, to reinstate their forfeited lands, is a vested right.

As the limitation period of five (5) years time was not in the Statute of 1897, the Land Commissioner would have to be using the provision which was amended in 1941 and in 1951, so if he and his attorneys are correct in the contention then they were using these amended Acts which the Legislature passed after the contract was made in 1910.

Art. 1, Sec. 10 of the Constitution of the United States in part is as follows:

> "No state shall * * * pass any * * * law impairing the obligation of contracts * * *."

As we have set out before in the early part of the brief, the *Act of 1897, ch. 129*, which provided for the reinstatement of forfeited lands did not have in it, the five (5) year statutory time of exercising the right, as well as other basic requirements. This statute was

cited in the contract of 1910 as "Chapter 129, Act of May 19, 1897."

In 1941 and 1951 the Legislature amended this Act and put in, among other basic changes as grazing leases and delays by reason thereof, and the five (5) year limitation specified.

> "Forfeitures by statute or contract are not favored." *Gulf Production Co.* v. *State, supra,* 98 Tex. 237, 231 S. W. 124, 131.

The Land Commissioner in his letter of July 24, 1952 stated that the only reason for denying the reinstatement to the plaintiff of his forefeited lands was because he had not exercised his right within the five (5) year time limitation. He was applying the 1951 and 1941 Amended Acts. If the Commissioner is correct in his contention then these Acts impaired the obligation of contract, insofar as they apply to contracts made before their enactment, and taken together with the Act of 1955, selling plaintiff's lands without adjudication, are unconstitutional.

Bradley v. *Lightcap,* 195 U. S. 1, 20, 24 (1904). The facts in this case are: At the time of the execution of the deed of trust the statutes of Illinois contained no limitation of time within which a Sheriff's or Master's deed must be taken after the period of redemption had expired, and prescribed no preliminary or laws of right to purchase by reason of delivery or failure in taking out such a deed. Subsequent to the execution of the deed of trust, and prior to the foreclosure of it, the Legislature passed an Act providing

that the Sheriff's and Master's deeds must be taken out within five (5) years from the expiration at the time of redemption and providing, that when such deed is not taken out within such time, the certificate of purchase shall be null and void. The Court held, that the law did not apply to deeds of trust executed prior to the passing of the Act and made the following statement:

> "But this Court held, through Mr. Justice Miller, that all of the laws of the state existing at the time a mortgage or any other contract is made, which affects the rights of parties to the contract, entered into and became a part of it, and are obligatory on all Courts which assume to give a remedy on such contract; * * * that it is therefore said that these laws enter into and become a part of the contract—and that the remedy subsisting in a state when and where a contract is made and to be performed is a part of the obligation * * * The statutes contain no limitation of time within which a Sheriff's or Master's deed must be taken after the period of redemption had expired. * * *"

After the contract was made the Legislature passed an Act which changed and added a five (5) year limitation as follows: Section 30 of the new Act provided:

> "When the premises mentioned in any such certificate shall not be redeemed in pursuant of law, the legal holder of such certificate shall be entitled to a deed, therefore, at any time within five (5) years from the expiration of the time of redemption. * * * When such deed is not taken within the time limit by this Act, the certificate of purchase shall be null and void. * * *"

At p. 24, it is further said by the Supreme Court:

> "But reading the Act as the view of the Supreme Court tells us to do, as taking away her right to maintain her possession, we are of the opinion that it materially impairs the obligation of her contract, and deprives her of property without due process.
>
> "Judgment reversed."

It will be noted that the above five (5) year limitation is very similar to the five (5) year limitation which was put on by the Texas Legislative Amendments in the 1941 and 1951 Acts.

The Supreme Court of the State of Texas also has ruled unconstitutional the Act of changing from a ten (10) year Statute of Limitation to a four (4) year Statute of Limitation and in one of the leading cases which has been since quoted, *Frank* v. *The State Bank and Trust Company*, Tex. Com. App. 1924 (Entered as Judgment of Supreme Ct.), 263 S. W. 255, 256, 258, the facts are set out at p. 255 S. W.:

> "The Legislature in 1913 amended Art. 5693 of the Civil Statutes (Vernon, Sayles' Ann. Civ. St. 1914, Art. 5693) changed the time for sale of trust deed under deeds of trust from ten (10) to four (4) years, and provided that new limitations should apply to deeds of trust executed prior to the passing of the new Act."

Plaintiffs in error contends that the Act of 1913, insofar as it attempts to change the period of limitation of sale, under the deed of trust then existing and executed subsequent to 1905, is in contravention of

both the State and Federal Constitution, in that said Act impairs the obligation of contract.

It was said by the Court:

"6 Ruling Case Law, p. 325, states the general rule as to this question as follows:

'Conformably to the well-established rule that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms, the obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and the rules which they prescribe.'

"And it as applied to mortgages on page 365, same volume, it is stated: 'The general rule is that the law in force at the time the mortgage is executed, with the condition and limitation it imposes, is the law which determines the force and affect of the mortgage; and hence it is that changes in the law imposes conditions and restrictions on a mortgagee in the enforcement of his right, and which affects its substance, are invalid as impairing the obligation and cannot prevail.'

"* * * Such Legislation impairs the obligation of contract, takes away vested rights, and is therefore prohibited by the Constitution."

At p. 258:

"We therefore hold that the Amendment of 1913 is unconstitutional insofar as it attempts to apply the new period of limitation of four (4) years, to the deeds of trust that were executed prior to the enactment of the Amendment.

"Cureton J. C. The judgment recommended will be entered as a judgment of the Supreme Court" of Texas.

Later in 1927 the United States Court of Appeals for the Fifth Circuit in *Drumright, et al. v. Texas Sugarland Co., et al.*, 16 F. 2d 657, 658, cert. denied, 1927, 274 U. S. 749, had before it the same question which was before the Texas Court in the *Frank v. The State Bank and Trust Company, supra.* It involved the ten (10) year Statute of Limitations reduced to four (4) years and also mortgage deeds of trust where the Legislature passed the Act subsequent to the making of the contract and the Court said in citing the above Texas case at p. 658 as follows:

"The Act of the Texas Legislature of 1913 (Vernon's Sayles' Tex. Civ. Statute 1914, Art. 5693), providing that the lien of a mortgage shall cease to exist four years after the maturity of the debt secured thereby, is unconstitutional as to the above mentioned mortgage, executed in 1907 and securing a debt, which matured in 1918, the previous existing Statute, which prescribed a limitation of ten (10) years, being applicable to such mortgage. *Frank v. State Bank and Trust Company*, Tex. Com. App., 263 S. W. 255."

In the *General Principles of Constitutional Law in the United States of America, 3rd edition* by Thomas M. Cooley, and Andrew C. McLaughlin, at p. 331 note three says as follows:

"A general law which is a standing offer of land becomes a contract if the offer is accepted

and payment made, so that the certificate of sale cannot be cancelled under the new law. *Pennoyer v. McConnaughty*, 140 U. S. 1."

The facts in this case are: The State Legislature in 1870 passed an Act selling sump land which inured to the party under the Act of 1860. In 1878 Owens made an application to purchase sump land. Patent would not issue until all monies were paid. 20% of the amount was paid. Before all of the amount was paid the State Legislature passed another Act in 1887 declaring void and of no effect all of the former certificates issued.

A citizen of California had bought some of these certificates and brought a suit in equity and asked for an injunction to prohibit the enforcement of the 1887 Act claiming that it violated the impairment of the obligation of contract under the Constitution of the United States.

It was stated at p. 24:

> "In other words, by such payment, this contract with the state become so ~~fully~~ executed as to be in force in a class of contracts protected by Art. 1, Sec. 10 of the Const. of the United States which declares that 'No state shall pass any law impairing the obligation of contract'."

Further at p. 25:

> "That Legislation surely impaired the obligation of the contract Owen had with the State, for its effect was to destroy valuable property, rights and privileges belonging to him."

It is further said p. 18:

> "The case cannot be distinguished in principle, from *Osborn* v. *Bank*, *Davis* v *Gray*, *Board* v. *McComb*, and *Allen* v. *The Railroad Company*, cited above;[1] and the reasoning in those cases apply with equal force in this."

A state cannot modify, except by mutual consent, any provision of a pre-existing contract into which it may have entered. *New Jersey* v. *Wilson*, 7 Cranch, 164, 167; *Sovereign Camp* v. *Wilentz*, 23 F. S. 23, appeal dis., 306 U. S. 573, D.C.N.J., 1938; *Columbia Railroad Company* v. *South Carolina*, 261 U. S. 236, 248, 251 (1922).

Mr. Chief Justice Marshall gave us some light on this subject as far back as 1812, in *New Jersey* v. *Wilson, supra.* The State of New Jersey had passed Legislation giving the Indians a part of the land tax free provided the Indians released their rights to the rest of certain portions of land. Later the New Jersey Legislature repealed this Act and tried to make the Indians' vendees pay taxes and speaking for the Court, he said:

> "The purchaser succeeds, with the assent of the State, to all the rights of the Indians. He stands, with respect to its land, in their place, and claims the benefits of their contract. This contract is certainly impaired by a law which would annul this essential part of it."

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[1] *Osborn* v. *Bank*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall 203; *Board* v. *McComb*, 92 U. S. 531, 541; *Allen* v. *The Railroad Company*, 114 U. S. 311.

After the Land Commissioner had refused to reinstate the land in carrying out the provisions of the amended Act of the Legislature of 1941 and 1951, the Legislature again in 1955 passed an Act granting the Land Commissioner the right to sell this land and other lands totaling 14,000 acres, to the defendant. This was known as *Senate Bill No. 295, Ch. 278, 56th Legislature, regular Session 1955.* This Act was what they call a Special Local Act and is not found in any of the Vernon's Civil Statutes of the State of Texas but was found in the Secretary of State's Office. (Appendix to this brief, no. 4.) Plaintiff never heard of this Act, until June 1, 1961.

We may obtain some assistance from Mr. Justice Sutherland in speaking for the Supreme Court, said in *Columbia Ry. Co. v. So. Carolina, supra,* 261 U. S. 236, 248, 251 (1922), as follows:

> "We begin the inquiry with the general rule before us 'Conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication and are not construed strictly'. * * *
>
> "The effect of the Act of 1917 is to convert that which we have held to be a covenant into a condition subsequent and to impose as a penalty for its violation the forfeiture of an extensive and valuable property. It requires no argument to demonstrate that this constitutes an impairment of the contract here involved, in violation of the Constitution. The impairment of a contract may consist in increasing the burdens as well as in diminishing its efficiency. 'Any deviation from its terms, by postponing or accelerating the period

of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are however minute, or apparently immaterial, in their affect upon the contract of the parties, impairs its obligation.' *Green* v. *Biddle*, 8 Wheat 1, 84. * * *"

CONCLUSION.

The plaintiff, as a matter of law, substantially complied with the reinstatement of his forfeited lands on July 23, 1952 regardless of the actions taken by the Land Commissioner.

The defendant, as a matter of law, received no legal rights when it received the patent in 1956 from the General Land Office Commissioner, who acted without authority.

The General Land Commissioner and his attorneys acted without authority and of no affect when they refused to reinstate the forfeited land to the plaintiff by his letter of July 24, 1952.

The General Land Office Commissioner in refusing to apply the 1897 Act which was part of the plaintiff's contract of 1910 and written in it in two places, at the first two lines in the contract and in the "Obligation" later on, acted without authority and of no affect.

The General Land Office Commissioner in applying the amended Legislative Acts of 1941 and 1951, after the 1910 contract had been made, was without authority and of no affect.

During the time after forfeiture and before the reinstatement, the Supreme Court of Texas, from 1900

to 1960 has repeatedly held that plaintiff had vested rights, "provided that no rights of third persons may have intervened."

The Land Commissioner had received the written notice that plaintiff claimed these lands, which he acknowledged in his letter of July 24, 1952, copy of which remained an official record of the Land Office. When he did not reinstate the forfeited lands, the Attorney General of the State, under the Statutory Law at the time this contract was made, had a duty to adjudicate the question of the claims before the Land Commissioner had authority to resell them.

If the Land Commissioner and his attorneys were correct in applying the amended Acts passed in 1941 and 1951 and the Act of 1955, then the Legislative Acts themselves, taken together, impair the obligation of contract previously made and are unconstitutional, insofar as they apply to contracts made before the Legislative Acts were passed.

If the defendant received no rights under such patents it has nothing to ripen into a limitation period or to claim estoppel or apply the principle of laches. All the rights defendant has left, is to return the patents to the Land Commissioner and get the paid purchase money back from the Comptroller.

The plaintiff must pay the interest he has before tendered, but not accepted and returned and any other interest due since 1952 under his contract of 1910. Even though, as a matter of law, he substantially complied with the reinstatement of his forfeited lands on July 23, 1952.

In *Davis* v. *Yates*, 63 C. A. 6, 133 S. W. 281, 285, 286, Writ of Error Denied, Tex., 1911, as was said by the Court:

> "From what has been said Yates' statutory right to reinstate accrued when he made his request and complied with the statute, and the postponement of the official indorsement did not postpone his right * * *.
>
> "Besides, after the reinstatement and the cancellation, defendants had no recognized right to be protected by said limitation statute. * * *
>
> "We conclude there was no estoppel. * * *
> "We hold in this connection that such right of Yates became fixed as of the date of his compliance with the terms of the statute and at that time appellant Davis had acquired no rights."

Respectfully submitted,

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Louisville 2, Kentucky,
Attorneys for the Plaintiff.

January 10, 1962.

APPENDIX No. 1.

Texas Statute, At Time Contract Was Made in 1910 for the Reinstatement of Forfeited Lands. Act Applying to This Plaintiff.

Texas, Acts 1897, ch. 129, pp. 184-185, S.S.B. No. 63, 25th Leg.

Article 4218f. When any portion of said land has been classified to the satisfaction of the commissioner of the general land office, under the provisions of this chapter or former laws, such lands shall be subject to sale, but to actual settlers only, except where otherwise provided by law, and in quantities of not less than eighty acres or multiples thereof, nor more than four sections containing six hundred and forty acres, more or less; provided, that the purchaser shall not include in his purchase more than two sections of agricultural land; and provided, that where there is a fraction less than eighty acres of any section left unsold, such fraction may be sold. Any bona fide purchaser who has heretofore purchased or who may hereafter purchase any lands as provided herein shall have the right to purchase other lands in addition thereto; provided, that the total of his purchases shall not exceed four sections, and that it shall not include more than two sections of agricultural land, upon his making oath that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. And if he or his vendor has already resided upon his home section for three years, or when he or his vendor, or both together, shall have resided upon it for three years, the additional lands purchased may be patented at any time. In all cases where a settler purchases more than one section the lands in excess of one section so purchased must be

situated within a radius of five miles of the land occupied by him. Where any of the lands referred to in this act have been sold prior to July 30th, 1895, in quantities greater or less than forty acres or multiples thereof, and are in good standing as to interest payments, they may be patented in such quantities. *In any cases where lands have been forfeited to the State for the non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred.* (Emphasis added.)

APPENDIX No. 2.

Acts 1941, 47th Leg., p. 351, Ch. 191, Sec. 3; Article 5326, Vol. 15 Vernon's Civil Statutes of the State of Texas, Annotated.

Art. 5326. 5423 Forfeiture for nonpayment of interest; reinstatement; outstanding grazing leases

If any portion of the interest on any sale should not be paid when due, the land shall be subject to forfeiture by the Commissioner entering on the wrapper containing the papers "Land Forfeited," or words of similar import with the date of such action and sign it officially, and thereupon the land and all payments shall be forfeited to the State, and the lands may be offered for sale on a subsequent sale date. *In any case where lands may hereafter be forfeited to the State for non-payment of interest, the purchasers, or their vendees, heirs, or legal representatives, may have their claims reinstated on their written request, by paying into the Treasury the full amount of interest due on such claim up to the date of reinstatement, provided that no rights of third persons may have intervened.* The right to reinstate shall be limited to the last purchaser from the State or his vendees or their heirs or legal representatives. *Such right must be exercised within five (5) years from the date of the forfeiture,* and the right to reinstate any claim heretofore forfeited by the Commissioner must be exercised within five (5) years from the effective date of this Act, but not thereafter. In case there is an outstanding valid grazing lease which would prevent reinstatement within the time prescribed by this Act then such claim may be reinstated within sixty (60) days after the expiration of such grazing lease, provided application for reinstatement shall have been filed in the General Land Office within the five-year period above prescribed accompanied with payment of all interest due thereon. *In all such cases, the*

original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred. If any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death before the Commisisoner shall forfeit the land belonging to such deceased purchaser, and should such forfeiture be made by the Commissioner within said time, upon proper proof of such death being made such forfeiture shall be set aside. Nothing in this Article shall inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land. Acts 1897, pp. 39, 184; Acts 1919, p. 314; Acts 1941, 47th Leg., p. 351, ch. 191, § 3. (Emphasis added.)

APPENDIX No. 3.

Acts 1951, 52nd Leg., p. 92, Ch. 59, Sec. 2; Article 5326, Volume 15, Vernon's Civil Statutes of the State of Texas, Annotated.

Art. 5326, 5423. Forfeiture for nonpayment of interest; reinstatement; outstanding grazing leases

If any portion of the interest on any sale should not be paid when due, the land shall be subject to forfeiture by the Commissioner entering on the wrapper containing the papers "Land Forfeited," or words of similar import, with the date of such action and sign it officially, and thereupon the land and all payments shall be forfeited to the State, and the lands may be offered for sale on a subsequent sale date. *In any case where lands have heretofore been forfeited or may hereafter be forfeited to the State for nonpayment of interest, the purchasers, or their vendees, heirs or legal representatives, may have their claims reinstated on their written request by paying into the Treasury the full amount of interest due on such claim up to the date of re-instatement, provided that no rights of third persons may have intervened. The right to re-instate shall be limited to the last purchaser from the State or his vendees or their heirs or legal representatives. Such right must be exercised within five (5) years from the date of the forfeiture.* In case there is an outstanding valid grazing lease which would prevent re-instatement within the time prescribed by this Act then such claim may be re-instated within sixty (60) days after the expiration of such grazing lease, provided application for re-instatement shall have been filed in the General Land Office within the five-year period above prescribed, accompanied with payment of all interest due thereon. *In all cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred.* If any purchaser shall die,

his heirs or legal representatives shall have one (1) year in which to make payment after the first day of November next after such death, before the Commissioner shall forfeit the land belonging to such deceased purchaser; and should such forfeiture be made by the Commissioner within said time, upon proper proof of such death being made, such forfeiture shall be set aside, provided that no rights of third persons may have intervened. Nothing in this Article shall inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land. As amended Acts 1951, 52nd Leg., p. 92, ch. 59, § 2. (Emphasis added.)

APPENDIX No. 4.

Acts 1955, Senate Bill No. 295, Chapter No. 278, 56th Leg., Regular Session, 1955, Signed by the Governor on May 20, 1955 and Filed in Secretary of State's Office May 23, 1955. Not in Any of Vernon's Civil Statutes of the State of Texas.

CHAPTER No. 278

S. B. No. 295

AN ACT

authorizing the Commissioner of the General Land Office for the State of Texas to sell Public Free School Land situated in El Paso County, Texas, to the City of El Paso, Texas; and declaring an emergency.

Be It Enacted By The Legislature Of The State Of Texas:

Section 1. The Commissioner of the General Land Office is hereby authorized to sell to the City of El Paso, El Paso County, Texas, for a total consideration based on the aggregate fair and reasonable market value of said land, but no less than $6.50 per acre, as determined by two appraisers appointed by the Commissioner of the General Land Office of Texas, the following described Public School Lands situated in El Paso County, and described as follows, to-wit:

Township 1, Block 81—T & P Railway Co. Survey

N½ of Section 28	321 acres
Section 22	642 acres
Section 18	642 acres
Section 24	642 acres
Section 4	663.6 acres
Section 16	670.7 acres
Section 6	661.2 acres

Township 1, Block 82—T & P Railway Co. Survey
Section 10 . . . . . 640 acres

Township 1, G. A. Mundy Survey
Section 248 . . . . . 640 acres
Section 249 . . . . . 640 acres
Section 250 . . . . . 640 acres
Section 251 . . . . . 259.5 acres

L. E. Mundy Survey
Section 232 . . . . . 640 acres
Section 234 . . . . . 640 acres
Section 235 . . . . . 292 acres

N. D. Mundy Survey
Section 245 . . . . . 560 acres
Section 246 . . . . . 637.5 acres
N ½ of Section 240 . . . . . 328.65 acres

S. J. Larkin Survey
Section 269 . . . . . 640 acres
Section 268 . . . . . 640 acres
Section 267 . . . . . 640 acres

H. G. Foster Survey
Section 256 . . . . . 640 acres
North ½ of Section 257 . . . . . 320 acres
North ½ of Section 258 . . . . . 320 acres
Section 262 . . . . . 640 acres

and aggregating 14,000.15 acres. Said lands shall be sold upon the filing in the General Land Office of an application to purchase by the proper authority of the City of El Paso accompanied by payment of the full consideration herein provided. Such sale shall be subject to any right-of-way easements, surface leases, or any oil, gas, mineral leases or permits theretofore given by the State on said lands. All mines and minerals and mineral rights, including oil and gas in and under said lands, together with the right to enter thereon for the purpose of exploration and development, are hereby reserved to the State of Texas, and said lands shall be subject to lease by the State for mineral exploration and development in the same manner as is now, or may

hereafter be provided for the leasing of unsold Public Free School Lands; provided, however, that the School Land Board or other legally constituted authority offering said lands for lease shall place in said leases such rules and regulations as may be deemed proper by said board or agency for the prevention of pollution and contamination of the fresh waters in, on, and under said lands.

Sec. 2. Upon payment of the purchase money provided herein, payments of fees required by law, and the filing in the General Land Office of any field notes or corrected field notes required by the Commissioner of the General Land Office, patents shall be issued to the City of El Paso containing the reservations provided for in Section 1 of this Act.

Sec. 3. The fact that the City of El Paso is in urgent need of expanding its sources of water and of protecting water wells previously drilled creates an emergency and an imperative public necessity that the Constitutional Rule that each bill be read on three several days in each House be suspended, and such Rule is hereby suspended, and this Act shall take effect from and after its passage, and it is so enacted.

(s) Ben Ramsey
President of the Senate

(s) Jim Lindsey
Speaker of the House

I hereby certify that S. B. No. 295 passed the Senate on April 25, 1955, by a viva voce vote; May 9, 1955, Senate concurred in House amendments, by a viva voce vote.

(s) Loyce M. Bell
Secretary of the Senate

I hereby certify that S. B. No. 295 passed the House on May 5, 1955, with amendments, by the following vote: Yeas 136, Nays 0.

(s) Dorothy Hallman
Chief Clerk of the House

Approved:
May 20, 1955
Date

Allan Shivers
Governor

Filed in the Office of the
Secretary of State
10 o'clock
May 23, 1955
(s) A. M. Muldrow
Secretary of State

(Seal)

THE STATE OF TEXAS
Secretary of State

I, W. O. Bowers, III, Assistant Secretary of State of the State of Texas Do Hereby Certify that the attached is a true and correct copy of the following described instruments on file in this office;

Senate Bill No. 295, 56th Legislature, Regular Session, 1955, as signed by the Governor on May 20, 1955 and filed for record in this office on May 23, 1955.

In Testimony Whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this 15th day of September, A. D. 1961.

(s) W. O. Bowers, III
Assistant Secretary of State

(Seal)

APPENDIX No. 5.

Duty of the Attorney General of the State of Texas As It Was in 1910, Date of Contract.

Acts, Feb. 23, 1900, Sec. 8, Ch. 11, p. 29 at pp. 33-34, First Called Session.

SEC. 8. *When any of the lands described in this act, or any of the other public lands of the State held or owned by any fund, or any lands in which this State, or any such funds have an interest, are held, occupied or claimed by any person or association or corporation, adversely to the State, or to such fund; it shall be the duty of the Attorney-General* to institute suit therefor, together for rent thereon, for any damages thereto, and for the purpose of any such suits for such lands, *or affecting the title thereto or right growing out of the same,* the venue thereof is fixed in Travis county, Texas, concurrently with the county of defendant's residence, and the courts of said county shall have the same jurisdiction over the defendant and the subject matter of the same as if such defendant resided, and such property was situated in said county. (Emphasis added.)